

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFT ADVISORY OPINION 2010-15 is now available for comment. It was requested by Brian G. Svoboda, Esq. and Jonathan S. Berkon, Esq., on behalf of Pike for Congress, and is scheduled to be considered by the Commission at its public meeting on Thursday, August 26, 2010.

If you wish to comment on the DRAFT ADVISORY OPINION 2010-15, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand deliver or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on Wednesday, August 25, 2010.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).**
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fec.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.**
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.**
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.**

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
(202) 694-1040

Comment Submission Procedure: Rosemary C. Smith
Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to 2010-15, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Rosemary C. Smith, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463



FEDERAL ELECTION COMMISSION
Washington, DC 20463

SECRETARIAT

2010 AUG 19 P 2:34

AGENDA ITEM

For Meeting of 8-26-10

August 19, 2010

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*
General Counsel

Rosemary C. Smith *PCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Joanna S. Waldstreicher *JSW*
Attorney

Subject: Draft AO 2010-15 (Pike for Congress)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 26, 2010.

Attachment

1 **ADVISORY OPINION 2010-15**

2 **Brian G. Svoboda, Esq.**
3 **Jonathan S. Berkon, Esq.**
4 **Perkins Coie, LLP**
5 **607 Fourteenth Street N.W.**
6 **Washington, DC 20005-2003**

DRAFT

7 **Dear Messrs. Svoboda and Berkon:**

8 **We are responding to your advisory opinion request on behalf of Pike for**
9 **Congress (“the Committee”), concerning the application of the Federal Election**
10 **Campaign Act of 1971, as amended (“the Act”), and Commission regulations to the**
11 **Committee’s refund of two contributions the candidate made to the Committee. The**
12 **Commission concludes that the Committee may refund the contributions to the candidate.**

13 ***Background***

14 **The facts presented in this advisory opinion are based on your letter received on**
15 **July 14, 2010 and publicly available materials, including reports filed by the Committee**
16 **with the Commission.**

17 **The Committee is the principal campaign committee for Douglas Pike, who was a**
18 **first-time candidate in the May 18, 2010 Democratic primary for the House of**
19 **Representatives in Pennsylvania’s Sixth District.**

20 **On December 31, 2009, Mr. Pike contributed \$340,000 of his personal funds to**
21 **the Committee, and on March 31, 2010, he contributed an additional \$100,000 to the**
22 **Committee. These contributions were not designated in writing for either the primary**
23 **election or the general election, and although Mr. Pike states that he intended them to be**
24 **used for the general election, the two contributions were reported as primary election**
25 **contributions on the Committee’s year-end 2009 report and April 2010 quarterly report.**

1 Over the course of his campaign, Mr. Pike made a number of other contributions to the
2 Committee, totaling \$622,705.47, in addition to the \$440,000 that is the subject of this
3 advisory opinion. He intended these other contributions to be used for the primary
4 election and they were reported as such.

5 Mr. Pike did not win the Democratic primary on May 18, 2010, and therefore he
6 is no longer a candidate for the House of Representatives. According to the Committee's
7 July 2010 quarterly report to the Commission, as of June 30 the Committee has no
8 outstanding debts, and has \$548,127.10 cash on hand. The Committee refunded all
9 general election contributions to contributors other than Mr. Pike.

10 The Committee asks whether it may refund Mr. Pike's December 31, 2009 and
11 March 31, 2010 contributions, totaling \$440,000.

12 ***Question Presented***

13 *May the candidate's contributions that were intended to be for the general*
14 *election but were not designated as such nevertheless be treated as general election*
15 *contributions and refunded to the contributor if the candidate is not a candidate in the*
16 *general election?*

17 ***Legal Analysis and Conclusions***

18 Although the candidate's undesignated contributions made on December 31, 2009
19 and March 31, 2010 are treated as primary election contributions, they may be refunded
20 to the candidate.

21 Candidates for Federal office may make unlimited expenditures from their
22 personal funds. 11 CFR 110.10. The Commission has interpreted this provision to mean
23 that a candidate may also make unlimited contributions to his or her authorized

1 committee. Advisory Opinions 1985-33 (Collins) and 1984-60 (Mulloy). The Act
2 requires that the reports filed by a candidate's principal campaign committee disclose,
3 among other transactions, all loans made by or guaranteed by the candidate, as well as
4 contributions from the candidate. 2 U.S.C. 434(b)(2)(B), (G) and 434(b)(8); *see also*
5 11 CFR 104.3(a)(3)(ii) and 104.3(d).

6 Commission regulations provide that contributions that are not designated in
7 writing by the contributor for a particular election are to be considered made for "the next
8 election for that Federal office after the contribution is made." 11 CFR 110.1(b)(2)(ii).
9 Therefore, when Mr. Pike made his contributions before the primary election and without
10 any written designation, they were contributions for the primary election, the "next
11 election" for the House of Representatives, and indeed the Committee reported them as
12 primary election contributions.

13 A candidate, like any other contributor, may request a refund of a primary
14 election contribution. No provision of the Act or any Commission regulation prevents
15 the Committee from refunding lawful primary election contributions upon request, if it
16 desires to do so. *See. e.g.,* Advisory Opinions 1996-52 (Andrews); 2003-30 (Fitzgerald).
17 The Commission notes that no creditors have competing claims to the Committee's
18 remaining funds and that the Committee's cash on hand exceeds the total amount of the
19 refunds it wishes to make to the candidate. The Commission has previously observed
20 that "in some circumstances, refunding contributions could raise personal use issues if
21 refunds are made on the basis of criteria that are not campaign related." Advisory
22 Opinion 1996-52 (Andrews); *see also* 2 U.S.C. 439a(b)(1). A refund of a candidate's
23 contribution to his own campaign, however, does not fall into any of the categories

1 enumerated in the Act and Commission regulations as *per se* personal use. See 2 U.S.C.
2 439a(b)(2) and 11 CFR 113.1(g)(1)(i). In Advisory Opinion 1980-147 (Yearout), the
3 Commission concluded that when a candidate donates personal funds to his authorized
4 committee in order to provide partial refunds to contributors, and some of those refund
5 checks are not cashed, the authorized committee's refund to the candidate is not a
6 prohibited conversion to personal use. Similarly, here the Committee's refund of Mr.
7 Pike's contributions would not be a conversion to personal use, and therefore the
8 restriction on conversion of campaign funds to personal use (2 U.S.C. 439a(b) and
9 11 CFR 113.2(e)) is not an impediment to the refund of Mr. Pike's contributions.
10 Therefore the Committee may refund Mr. Pike's contributions. The refund must be
11 disclosed on the Committee's report covering the period in which the refund is made.
12 2 U.S.C. 434(b)(4)(F) and (5)(E); 11 CFR 104.8(d)(4).

13 The Commission expresses no opinion as to any possible tax consequences of
14 the refund of contributions, because those issues, if any, are outside the Commission's
15 jurisdiction.

16 This response constitutes an advisory opinion concerning the application of the
17 Act and Commission regulations to the specific transaction or activity set forth in your
18 request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
19 of the facts or assumptions presented and such facts or assumptions are material to a
20 conclusion presented in this advisory opinion, then the requester may not rely on that
21 conclusion as support for its proposed activity. Any person involved in any specific
22 transaction or activity which is indistinguishable in all its material aspects from the
23 transaction or activity with respect to which this advisory opinion is rendered may rely on

1 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
2 conclusions in this advisory opinion may be affected by subsequent developments in the
3 law including, but not limited to, statutes, regulations, advisory opinions and case law.
4 The cited advisory opinions are available on the Commission's website at
5 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Matthew S. Petersen
Chairman